

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

BRICE GLASGOW,

Petitioner,

v.

BEN CURRY, Warden,

Respondent.

No. C 07-1851 CW (PR)

ORDER DENYING PETITION
FOR WRIT OF HABEAS CORPUS

On April 3, 2007, Petitioner Brice Glasgow, a state prisoner incarcerated at the Correctional Training Facility at Soledad, filed a pro se petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 challenging as a violation of his constitutional rights the denial of parole by the California Board of Parole Hearings (Board).¹ On October 23, 2007, Respondent Warden Ben Curry filed an answer. Petitioner timely filed a traverse. Having considered all of the papers filed by the parties, the Court DENIES the petition.

BACKGROUND

On March 1, 1980, Petitioner knocked on the door of his niece Patricia Watts' home at five in the morning. (Resp't Ex. 3, Jan.

¹ The Board of Prison Terms was abolished effective July 1, 2005, and replaced with the Board of Parole Hearings. Cal. Penal Code § 5075(a).

1 29, 1981 Report of Adult Probation Officer at 2.) She refused to
2 let him in then, but allowed him to enter her home later in the
3 morning when he returned. (Id.) Petitioner sat in Watts' living
4 room for ten minutes and played with her daughter. (Id.) There
5 was a knock at the door and Petitioner allowed Edmund Duhart to
6 enter. (Id.) Petitioner then walked towards the hallway with a
7 gun in his hand. (Id.) Watts ran to the bedroom and attempted to
8 wake her boyfriend Ralph Collins. (Id.) Petitioner entered the
9 bedroom and a struggle ensued between him and Collins. (Id.)
10 Petitioner shot Collins several times and also shot and injured
11 Watts in the back as she attempted to protect Collins. (Id. at 1-
12 2.) Petitioner apparently called to Duhart and asked him to
13 remove Watts from Collins. (Id.) After the shooting, Petitioner
14 and Duhart left the apartment. (Id.) Collins died of gunshot
15 wounds to the head, chest and abdomen; two of the gunshot wounds
16 entered his body through his upper back. (Id. at 3.) Petitioner
17 was arrested on the same day, March 1, 1980, by the Palo Alto
18 Police Department. (Id. at 1.)

19 On December 19, 1980, a jury found Petitioner guilty of first
20 degree murder and assault with a deadly weapon. Petitioner was
21 sentenced to a term of twenty-five years to life plus five years.
22 (Pet'r Ex. A, Nov. 2, 2005 Transcript of Parole Hearing at 1.)

23 Petitioner has an extensive record of over eighty-two
24 arrests, including burglaries, forgery, carrying concealed weapons
25 and battery. (Id. at 18.) Some of these arrests resulted in
26 convictions, including four felony convictions for possession of a
27 completed check, conspiracy and burglary. (Resp't Ex. 3 at 1.)

1 Several convictions occurred while Petitioner was on probation for
2 a previous crime. (Resp't Ex. 5, Feb. 2003 Life Prisoner
3 Evaluation Report at 4-7.) Petitioner was addicted to heroin for
4 over twenty-three years. (Pet'r Ex. A at 43.)

5 Petitioner was born in 1942 and was sixty-three years old at
6 the time of the 2005 parole hearing, which was his fourth parole
7 hearing. (Resp't Ex. 6, California Department of Justice Bureau
8 of Identification Report at 1; Resp't Ex. 8, Aug. 18, 2006
9 Petition for Writ of Habeas Corpus in Superior Court at 7.) The
10 Palo Alto Police Department recommended against his release due to
11 the gravity of the crime. (Pet'r Ex. A at 31.) The District
12 Attorney of Santa Clara County also recommended against his
13 release. (Id. at 58.)

14 At the hearing, the Board considered the following evidence.
15 Petitioner attended Narcotics Anonymous (NA) meetings in prison
16 for many years. (Id. at 34.) Several years ago, Petitioner
17 married a woman he knew before he was incarcerated and plans to
18 live with her if released on parole. (Id. at 23.) Petitioner has
19 offers of employment and a sponsor for his participation in NA
20 meetings. (Id. at 23-24.) Approximately fifty people signed a
21 petition advocating for his release on parole. (Id. at 25.) His
22 family members stated they would welcome him back home. (Id. at
23 29.)

24 Petitioner worked successfully in several vocations during
25 his time in prison. (Id. at 33.) He passed a General Educational
26 Development test, thus earning the equivalent of a high school
27 diploma. (Id. at 34.) Petitioner is a volunteer in the academic
28 department distance learning program and participates in the

1 prison's life skills program. (Id.) He took numerous life skills
2 classes, including anger management. (Id.) The Presiding
3 Commissioner on the Board noted that Petitioner had "more
4 laudatory chronos in [his] file than [she] had ever seen before."
5 (Id.) Petitioner also has a good disciplinary record in prison.
6 (Id. at 67.)

7 Petitioner's psychological report states that, if released to
8 the community, his "violence potential is considered to be no more
9 than that of the average citizen in the community." (Id. at 37.)
10 The report also states that Petitioner has been abstinent from
11 heroin for over twenty-three years and notes his regular
12 attendance at NA meetings. (Id.)

13 At his parole hearing, Petitioner said the following about
14 his current feelings about the crime: "I feel like I am
15 responsible for it and I [am] sorry it had to happen. It affected
16 me and it affected my family and it affected his family. And I
17 know that they suffer from it and so have I. If I could redo it
18 again I would do it much different." (Id. at 17.) Petitioner
19 testified that he had written letters of remorse to the families
20 of the victims. (Id. at 24.) Petitioner stated that he has
21 changed since the time of the crime and has accepted God in his
22 life. (Id. at 21.)

23 When asked how many times he shot Collins, Petitioner said,
24 "I don't know nothin about nothin." (Id. at 15.) He claimed that
25 he did not remember how Watts was shot. (Id.) When asked how he
26 would redo things now, Petitioner stated, "I would take the chance
27 of turning myself over to the care of God and I wouldn't leave the
28

1 scene like I did." (Id. at 17.)

2 Petitioner told his version of the commitment offense at the
3 parole hearing. Petitioner contended that he went to the bathroom
4 and when he came out Collins was there with something in his hand
5 Petitioner thought was a gun and he shot Collins out of fear.
6 (Id. at 13-15.) Petitioner had claimed until 2000 that the murder
7 weapon was the victim's gun; he only recently admitted that he
8 brought the gun into the house. (Id. at 55.)

9 After deliberation, the Board concluded that Petitioner was
10 not suitable for parole and would pose an unreasonable risk of
11 danger to society or a threat to public safety if released. (Id.
12 at 65.) The Board issued a one year denial of parole. (Id. at
13 68-69.) The Board stated that the main reason for its denial was
14 the commitment crime. (Id. at 65.) In support of its decision,
15 the Board cited the "cruel and callous" manner in which Petitioner
16 killed Collins, that multiple victims were attacked and that the
17 motive for the crime was "very trivial" in relation to the
18 offense. (Id. at 65-66.)

19 The Board was also concerned with the discrepancy between the
20 Petitioner's account of the crime and the surviving victim's
21 version which led to a first degree murder conviction. (Id.)
22 Citing Petitioner's eighty-two arrests, the Board stated
23 Petitioner had an "escalated pattern of criminal conduct and
24 violence," and had "failed previous rounds of probation and
25 parole." (Id. at 66.) The Board expressed concern that
26 Petitioner would revert back to his previous criminal behavior.
27 (Id.)

28 The Board commended Petitioner on his good prison record, his

1 participation in numerous programs, his plans for release and his
2 favorable psychological report. (Id. at 67-68.) However, the
3 Board suggested that Petitioner spend more time with a therapist
4 to discuss his prior criminal history and heroin use and how it
5 related to his crime. (Id.)

6 Petitioner filed a petition for a writ of habeas corpus in
7 the Santa Clara County Superior Court challenging the Board's
8 decision. On September 13, 2006, the superior court, in a one
9 paragraph opinion, denied the petition based on the fact that
10 "multiple victims were attacked, injured or killed." (Resp't Ex.
11 9, Sept. 13, 2006 Santa Clara County Superior Court Order at 1.)
12 Petitioner filed habeas petitions in the California court of
13 appeal and the California Supreme Court, both of which were
14 summarily denied. (Resp't Ex. 11, Jan. 25, 2007 California Court
15 of Appeal Order at 1; Resp't Ex. 12, Feb. 13, 2007 California
16 Supreme Court Order at 1.)

17 STANDARD OF REVIEW

18 Under the Antiterrorism and Effective Death Penalty Act of
19 1996 (AEDPA), a district court may not grant habeas relief unless
20 the state court's adjudication of the claim: "(1) resulted in a
21 decision that was contrary to, or involved an unreasonable
22 application of, clearly established Federal law, as determined by
23 the Supreme Court of the United States; or (2) resulted in a
24 decision that was based on an unreasonable determination of the
25 facts in light of the evidence presented in the State court
26 proceeding." 28 U.S.C. § 2254(d); Williams v. Taylor, 529 U.S.
27 362, 412 (2000). The first prong applies both to questions of law
28 and to mixed questions of law and fact, Williams, 529 U.S. at 407-

09, while the second prong applies to decisions based on factual determinations, Miller-El v. Cockrell, 537 U.S. 322, 340 (2003).

A state court decision is "contrary to" Supreme Court authority, that is, falls under the first clause of § 2254(d)(1), only if "the state court arrives at a conclusion opposite to that reached by [the Supreme] Court on a question of law or if the state court decides a case differently than [the Supreme] Court has on a set of materially indistinguishable facts." Williams, 529 U.S. at 412-13. A state court decision is an "unreasonable application of" Supreme Court authority, under the second clause of § 2254(d)(1), if it correctly identifies the governing legal principle from the Supreme Court's decisions but "unreasonably applies that principle to the facts of the prisoner's case." Id. at 413. The federal court on habeas review may not issue the writ "simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly." Id. at 411. Rather, the application must be "objectively unreasonable" to support granting the writ. See id. at 409.

"Factual determinations by state courts are presumed correct absent clear and convincing evidence to the contrary." Miller-El, 537 U.S. at 340. A petitioner must present clear and convincing evidence to overcome § 2254(e)(1)'s presumption of correctness; conclusory assertions will not do. Id. Although only Supreme Court law is binding on the States, Ninth Circuit precedent remains relevant persuasive authority in determining whether a state court decision is objectively unreasonable. Clark v. Murphy, 331 F.3d 1062, 1069 (9th Cir. 2003).

1 When there is no reasoned opinion from the highest state
2 court to consider the petitioner's claims, the court looks to the
3 last reasoned opinion to analyze whether the state judgment was
4 erroneous under the standard of § 2254(d). Ylst v. Nunnemaker,
5 501 U.S. 797, 801-06 (1991); Shackleford v. Hubbard, 234 F.3d
6 1072, 1079 n.2 (9th Cir. 2000). In the present case, the only
7 state court to address the merits of Petitioner's claim is the
8 Santa Clara superior court.

9 DISCUSSION

10 Petitioner asserts that California Penal Code § 3041(b)
11 imposes an affirmative obligation to grant parole which creates a
12 legally cognizable liberty interest. Petitioner argues that his
13 due process rights were violated by the Board's decision to deny
14 him parole because that decision was not supported by "some
15 evidence" in that he is not currently a threat to the public
16 safety.

17 The Supreme Court has clearly established that a parole
18 board's decision deprives a prisoner of due process with respect
19 to his constitutionally protected liberty interest in a parole
20 release date if the board's decision is not supported by "some
21 evidence in the record," or is "otherwise arbitrary." Sass v.
22 California Bd. of Prison Terms, 461 F.3d 1123, 1128 (9th Cir.
23 2006) (citing Superintendent v. Hill, 472 U.S. 445, 457 (1985)).²

24
25 ²Respondent argues that, under AEDPA, the "some evidence"
26 standard of Hill does not apply to parole suitability hearings
27 because the United States Supreme Court has not applied it in that
28 context. Respondent claims that the due process protections to
which California prisoners are entitled by clearly established
Supreme Court authority are limited to an opportunity to be heard
and a statement of reasons for denial. This position, however, has

1 This standard is met if there was "some evidence" from which the
2 conclusion of the administrative tribunal could be deduced. Hill,
3 472 U.S. at 455. An examination of the entire record is not
4 required nor is an independent weighing of the evidence. Id. The
5 relevant question is whether there is any evidence in the record
6 that could support the conclusion reached by the administrative
7 board. Id.

8 When assessing whether a state parole board's unsuitability
9 determination was supported by "some evidence," the court's
10 analysis is framed by the statutes and regulations governing
11 parole suitability determinations in the relevant State. Sass,
12 461 F.3d at 1128. Accordingly, in California, the court must look
13 to California law to determine the findings that are necessary to
14 deem a prisoner unsuitable for parole, and then must review the
15 record to determine whether the state court decision constituted
16 an unreasonable application of the "some evidence" principle. Id.

17 California law provides that a parole date is to be granted
18 unless it is determined "that the gravity of the current convicted
19 offense or offenses, or the timing and gravity of current or past
20 convicted offense or offenses, is such that consideration of the
21 public safety requires a more lengthy period of
22 incarceration" Cal. Penal Code § 3041(b).

23 The California Code of Regulations sets out the factors
24 showing suitability or unsuitability for parole that the parole
25 authority is required to consider. Cal. Code Regs. tit. 15,
26 § 2402(b). These include "[a]ll relevant, reliable information

27 _____
28 been rejected by the Ninth Circuit.

1 available," such as:

2 the circumstances of the prisoner's social
3 history; past and present mental state; past
4 criminal history, including involvement in
5 other criminal misconduct which is reliably
6 documented; the base and other commitment
7 offenses, including behavior before, during
8 and after the crime; past and present attitude
9 toward the crime; any conditions of treatment
10 or control, including the use of special
11 conditions under which the prisoner may safely
12 be released to the community; and any other
13 information which bears on the prisoner's
14 suitability for release. Circumstances which
15 taken alone may not firmly establish
16 unsuitability for parole may contribute to a
17 pattern which results in a finding of
18 unsuitability.

19 Id.

20 Circumstances tending to show unsuitability for parole
21 include the nature of the commitment offense and whether "[t]he
22 prisoner committed the offense in an especially heinous, atrocious
23 or cruel manner." Id. § 2402(c). This includes consideration of
24 the number of victims, whether "[t]he offense was carried out in a
25 dispassionate and calculated manner," whether the victim was
26 "abused, defiled or mutilated during or after the offense,"
27 whether "[t]he offense was carried out in a manner which
28 demonstrates an exceptionally callous disregard for human
suffering," and whether "[t]he motive for the crime is
inexplicable or very trivial in relation to the offense." Id.

Other circumstances tending to show unsuitability for parole
are a previous record of violence, an unstable social history,
previous sadistic sexual offenses, a history of severe mental
health problems related to the offense, and serious misconduct in
prison or jail. Id.

Circumstances tending to support a finding of suitability for

1 parole include no juvenile record, a stable social history, signs
2 of remorse, that the crime was committed as a result of
3 significant stress in the prisoner's life, a lack of criminal
4 history, a reduced possibility of recidivism due to the prisoner's
5 present age, that the prisoner has made realistic plans for
6 release or has developed marketable skills that can be put to use
7 upon release, and that the prisoner's institutional activities
8 indicate an enhanced ability to function within the law upon
9 release. Id. § 2402(d).

10 Petitioner argues that, under the reasoning of Biggs v.
11 Terhune, 334 F.3d 910, 915-16 (9th Cir. 2003), in denying parole
12 the Board improperly relied on static factors to find that he was
13 a threat to public safety.

14 In Biggs, the Ninth Circuit found that parole denial based
15 solely on the gravity of the commitment offense can initially
16 satisfy due process requirements, using the "some evidence"
17 standard. However, in dicta, the Biggs court stated that courts
18 may also consider the parole board's decision-making process over
19 time: "The Parole Board's decision is one of 'equity' and
20 requires a careful balancing and assessment of the factors
21 considered. . . . A continued reliance in the future on an
22 unchanging factor . . . runs contrary to the rehabilitative goals
23 espoused by the prison system and could result in a due process
24 violation." Biggs, 334 F.3d at 916-17.

25 The Ninth Circuit's opinion in Irons v. Carey sheds further
26 light on whether reliance on an immutable factor such as the
27 commitment offense violates due process. 505 F.3d 846, 850 (9th
28 Cir. 2007). In Irons, the District Court for the Eastern District

1 of California granted a habeas petition challenging the parole
2 board's fifth denial of parole where the petitioner had served
3 sixteen years of a seventeen years to life sentence for second
4 degree murder with a two-year enhancement for use of a firearm,
5 and where all factors indicated suitability for parole. 358 F.
6 Supp. 2d 936, 947 (E.D. Cal. 2005). The Ninth Circuit reversed.
7 505 F.3d 846 (9th Cir. 2007). The Ninth Circuit limited its
8 holding to inmates deemed unsuitable prior to the expiration of
9 their minimum sentences and left the door open for inmates deemed
10 unsuitable after the expiration of their minimum sentences. Id.
11 at 854. The Ninth Circuit stated:

12 We note that in all the cases in which we have
13 held that a parole board's decision to deem a
14 prisoner unsuitable for parole solely on the
15 basis of his commitment offense comports with
16 due process, the decision was made before the
17 inmate had served the minimum number of years
18 required by his sentence. Specifically, in
19 Biggs, Sass, and here, the petitioners had not
20 served the minimum number of years to which
21 they had been sentenced at the time of the
22 challenged parole denial by the Board. Biggs,
23 334 F.3d at 912; Sass, 461 F.3d at 1125. All
24 we held in those cases and all we hold today,
25 therefore, is that, given the particular
26 circumstances of the offenses in these cases,
27 due process was not violated when these
28 prisoners were deemed unsuitable for parole
prior to the expiration of their minimum
terms.

22 Id. at 853-54. The court recognized that at some point after an
23 inmate has served his minimum sentence, the probative value of his
24 commitment offense as an indicator of an unreasonable risk of
25 danger to society recedes below the "some evidence" required by
26 due process to support a denial of parole. Id.

27 Like the petitioner in Irons, Petitioner has not served his
28 minimum sentence. Petitioner was sentenced to twenty-five years

1 to life plus five years, a total minimum sentence of thirty years.
2 He had completed only twenty-five of his thirty year minimum
3 sentence at the time of the 2005 parole hearing. Petitioner's due
4 process rights were not violated when the Board deemed him
5 unsuitable for parole before his minimum sentence had been served.

6 Further, the Board relied on more than the single "unchanging
7 factor" described in Biggs in denying Petitioner parole. Although
8 the "cruel" nature of Petitioner's commitment offense weighed
9 heavily in the Board's determination, especially the attack on
10 multiple victims, the Board was also significantly influenced by
11 Petitioner's extensive criminal history and his previous failures
12 on probation and parole. (Pet'r Ex. A at 65-67.) The Board was
13 concerned with Petitioner's attitude towards the crime and the
14 discrepancy between his version of the crime and the evidence that
15 led a jury to convict him of first degree murder. The Board
16 suggested that he "really, really think" about the crime, and
17 spend more time with his therapist to address his past criminal
18 history and heroin use as it related to the crime. (Id. at 65-
19 67.) Thus, the Board relied on factors other than the commitment
20 offense for some evidence that Petitioner was unsuitable for
21 parole.

22 The Ninth Circuit's evolving guidance in Biggs, Sass and
23 Irons suggests that the Board can continue to evaluate static
24 factors, including the nature of the commitment offense and pre-
25 conviction criminality, as "some evidence" in deciding whether to
26 grant parole. The weight to be attributed to those immutable
27 events, however, should decrease as a predictor of future
28 dangerousness as the years pass and the prisoner demonstrates

1 favorable behavior. See Biggs, 334 F.3d at 916-17; Irons, 505
2 F.3d at 853-54. Should Petitioner follow the Board's advice by
3 expressing insight into and remorse for his crimes, talking with a
4 therapist about the impact his past criminal history and heroin
5 addiction had on his behavior and maintaining a positive
6 disciplinary record, continued parole denials based on
7 Petitioner's commitment offense and past criminal record alone
8 could eventually give rise to a due process violation after he
9 completes serving his minimum sentence of thirty years. See
10 Biggs, 334 F.3d at 916-17. However, at this time the state
11 court's decision affirming the Board's denial of parole was not
12 contrary to or an unreasonable application of Supreme Court
13 authority or an unreasonable application of the facts in light of
14 the evidence in the record.

CONCLUSION

16 For the foregoing reasons, the petition for a writ of habeas
17 corpus is DENIED. The Clerk of the Court shall enter judgment and
18 close the file.

19 IT IS SO ORDERED.

20 Dated: 10/17/08



21 CLAUDIA WILKEN
22 United States District Judge
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UNITED STATES DISTRICT COURT
FOR THE
NORTHERN DISTRICT OF CALIFORNIA

GLASGOW et al,

Case Number: CV07-01851 CW

Plaintiff,

CERTIFICATE OF SERVICE

v.

CURRY et al,

Defendant.

I, the undersigned, hereby certify that I am an employee in the Office of the Clerk, U.S. District Court, Northern District of California.

That on October 17, 2008, I SERVED a true and correct copy(ies) of the attached, by placing said copy(ies) in a postage paid envelope addressed to the person(s) hereinafter listed, by depositing said envelope in the U.S. Mail, or by placing said copy(ies) into an inter-office delivery receptacle located in the Clerk's office.

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Scott Colin Mather
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Dated: October 17, 2008

Richard W. Wieking, Clerk
By: Sheilah Cahill, Deputy Clerk